IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 374 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ABDULSATAR @ KALIO AZIZ SHAIKH

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 374 of 1992
MR Ashok D. Shah, Ld.Counsel for Petitioners
MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

Date of decision: 19/07/96

ORAL JUDGEMENT

Per: Dave, J :-

The appellant no.1 Abdulsatar @ Kalio Shaikh has been described as an employee or a servant, while the

appellant no.2 Ayub @ Iliyas Shaikh is said to be the master of the operation. On July 03, 1991, one Nazir Ahmedkhan Pathan was working as the Sub Inspector attached to the Surveillance Squad of Dariapur police station. After the mid-night he had received certain information and that the necessary report was submitted to the Inspector of Police Mr. Noel Parmar attached to Dariapur police station. The Superintendent of Police Mr. K.H.Rathod was also informed. Three constables, namely (1) Gopalsing, (2) Dansing and (3) Amrutbhai were also called. According to the case of the prosecution, at about 4 p.m. these police officials had seen two persons walking on the road. According to the case of the prosecution, they could know that they are the above said two persons who are the appellants before us. The appellant no.1 Abdulsatar @ Kalio was apprehended, while the appellant no.2 Ayub @ Iliyas Shaikh was able to make his escape good. Police constables Gopalsing and Amrutbhai after the unsuccessful chase had returned. The plastic bags being carried by the appellant no.1 Abdulsatar @ Kalio were seized and searched and this operation had revealed that both the bags were containing charas. The other formalities were performed and later on, on the completiton of the investigation the accused persons were charge sheeted. The charge at Exhibit-5 was framed by the learned Addl. City Sessions Judge, Ahmedabad, in Sessions Case No. 333 of 1991 on September 23, 1991. Appellant no.1 Abdulsatar @ Kalio was charged with the alleged commission of the offence punishable under Section 22 and 23 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPSA 1985"), while the appellant no.2 Ayub Iliyas Shaikh was charged for the offence punishable under Section 29 of the NDPSA 1985. The accused persons had pleaded not guilty to the charges levelled against them, but they have been convicted by the Court below upon the evidence which was made available to the said Court. The appellant no.1 has been convicted for the offence punishable under Section 20 (b) (2) of the NDPSA 1985, while the appellant no.2 has been convicted for the commission of the above said offence along with the offence punishable under Section 29 of the NDPSA 1985. Both of them have been sentenced to the R.I. for ten years and to a fine of Rs.1,00,000-00 each, in default to a further R.I. of two years. This judgment of conviction and sentence dated March 31, 1992 has been brought in challenge by the appellants by way of this appeal before us.

It shall have to be noticed that, two Criminal Appeals, namely Criminal Appeal No. 347 of 1992 and

Criminal Appeal No. 359 of 1992 were presented before this Court through jail, but there are no orders on the said appeals. This has probably happened because later on the appellants have presented this appeal before this Court after having availed the services of a counsel.

A two fold contention comes from learned counsel Mr. Ashok D. Shah, who appears on behalf of the appellants before us. The first contention based upon the provisions contained under Section 50 of the NDPSA 1985 is that, when it is the case of the prosecution that the muddamal charas came to be seized from appellant accused no.1, he was not given an option to say that he would like to be searched in presence of the nearest Gazetted Officer or a nearest Magistrate. Learned counsel urges that, if these mandatory provisions contained in Section 50 of the NDPSA 1985 have not been complied with, necessarily the conviction recorded - qua the appellant accused no.1 can not be sustained. So far as the other accused is concerned, the contention coming from learned counsel is that, if accused no.1 could not be convicted because of the above said infirmity, necessarily the provisions contained in Section 29 of the NDPSA 1985 could not be invoked and that, the appellant accused no.2 can never be convicted for abetting or entering into a criminal conspiracy for an offence which is not established against the appellant accused no.1.

We have heard learned counsel for the appellants Mr. Ashok D. Shah and learned Government Counsel Mr. S.T.Mehta on this two questions. We have perused the evidence tendered by Nazir Ahmed Pathan, PW-3, Exhibit-24 and of Novel Parmar, PW-10, Exhibit-38. Upon scrutiny of the evidence tendered by this two police officials, we shall have to say that the provisions contained in section 50 of the NDPSA 1985 have not been complied with. So far as the factual aspect is concerned, the concentration should be on the oral testimony of Nazir Ahmed Pathan, PW-3, Exhibit-24. According to him, some intelligence was received and they were on a watch and he had seen two persons coming from the opposite direction. The witness further says that the appellant no.1 was having a bag in which there was a plastic bag containing about 13 small pouches of charas. One another plastic bag was containing small pieces of charas. This quantity of charas was already seized by them and the opinion of the panchas regarding the smell and the identity of the charas was obtained. The appellant accused no.1 was asked to produce the necessary pass or permit and after his inability to show the same and after two police constables who were busy in an unsuccessful chase for the

apprehension of the appellant no.2, Inspector of Police Mr. Noel Parmar had asked and inquired from appellant no.1 as to whether he would like to be searched in presence of a Gazetted Officer or a Magistrate. Therefore this evidence tendered by Nazir Ahmed Pathan in the examination-in-chief, itself would make it abundantly clear that, this formality which appears to be absolutely meaningless and in vacuum was performed after the search and seizure were over. The very same conclusion would follow when one would read the evidence tendered by Inspector Noel Parmar, PW-10, Exhibit-38. He had also testified that, after the charas was recovered and the panchas had expressed their opinion and after the gold smith for the weighment was sent for, they had asked the appellant no.1 as to whether he would like to be searched in presence of Executive Magistrate or a Gazetted Officer. This say of Noel Parmar also comes in the examination in chief.

Thus, upon a conjoint reading of the evidence tendered by the above said two police officers, it becomes abundantly clear that, only after the search was made and the muddamal charas was seized and the panchas were consulted and the gold smith was called for, the empty formalities was performed. The legal implications which would follow from such a fact situation are not unknown. The Supreme Court pronouncement in Ali Mustafa Abdul Rahman Moosa, Appellant v. State of Kerala, Respondent, AIR 1995, S.C. Page.244, makes it clear that where a Police Officer on receiving information that a person is in possession of contraband (charas), wants to subject him to search, it is the duty of the Police Officer to give option to the person as to whether he desired to be searched in presence of a Gazetted Officer or a Magistrate as envisaged by Section 50 of the NDPSA 1985. This pronouncement of the Apex Court also makes it clear that the failure to provide that option to the accused vitiates the conviction. It is also said that the provisions contained in Section 50 of the NDPSA 1985 are mandatory in nature and the non-compliance thereof shall vitiate the conviction. It is also pointed out that, it is not necessary that the person who is about to be searched should by himself make a request. Thus, the Supreme Court pronouncement makes it clear that the provisions contained in Section 50 of NDPSA 1985 are mandatory in nature and caste an obligation upon the police officer to ascertain the option before the search is made. No useful purpose could be served by trying to assert the option after everything is over. In our view, therefore, learned counsel Mr. Ashok Shah is perfectly justified in making a grievance before us that the

mandatory provisions contained in Section 50 of the NDPSA 1985 have clearly been violated and that, therefore, the trial and the conviction have got vitiated. If once this position following from the factual and legal position is accepted, we shall have to allow the appeal - qua the appellant No.1 and shall have to acquit him of the offence punishable under Section 20(b)(2) of NDPSA 1985.

When the appellant no.1 from whose custody allegedly the contraband charas came to be recovered and or seized is being acquitted by us, the appellant no.2 obviously can not be held liable for the offence punishable under Section 29 of the NDPSA 1985. Section 29 provides for the punishment for abetment and criminal conspiracy . When the main accused appellant no.1 is found not to be guilty by us for the offence punishable under Section 20(b)(2) of the NDPSA 1985, it can not be legitimately held that the appellant no.2 should be held liable for the charge of abetment and conspiracy. In view of this position the conviction - qua the appellant no.2 also appears to be non maintainable. His appeal also therefore requires to be accepted.

The net result is that, the appeal filed by the appellants requires to be allowed, though slightly on different grounds. We allow the appeal and set aside the judgment of conviction and sentence rendered by the Court below. We acquit the appellants of the charges for which they were found guilty by the Court below. Both the appellants are behind the bars and therefore we direct that, they should be set at liberty, if not required in any other criminal case or proceedings.

Criminal Appeal No. 347 of 1992 and 359 of 1992 on which no orders have been passed shall stand disposed of, in view of the orders in the present appeal. D.S. permitted.
